LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
NOV 12 1966
JOHN F. DAVIS, CLERK

No. 613

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

STATE OF MISSOURI ex rel. State Highway Commission of Missouri,
Appellee,

vs.

ELWYN LOOMIS CADY and ANNABEL CADY,
Appellants.

ON APPEAL FROM THE KANSAS CITY COURT OF APPEALS OF MISSOURI.

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

ELWYN L. CADY, JR.
531 Altman Building
103 Petticoat Lane
Kansas City, Missouri 64106
324 Bellevista Drive
Independence, Missouri 64050
Counsel for Appellants.

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3939

No. 613

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

STATE OF MISSOURI ex rel. State Highway Commission of Missouri,
Appellee.

vs.

ELWYN LOOMIS CADY and ANNABEL CADY,
Appellants,

ON APPEAL FROM THE KANSAS CITY COURT OF APPEALS OF MISSOURI

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

I. Federal Government Only Can Emit Bills of Credit: the Prohibition Is Directed at the States.

Of course, the federal government is not subject to the bills of credit prohibition. Consequently, appellee's authorities dealing with Congressional enactments for the District of Columbia, *Wright* v. *Davidson*, 181 U.S. 371, and *Bauman*

v. *Ross*, 167 U.S. 548, are not in point. Neither is *U. S.* v. *River Rouge Impr. Co.*, 269 U.S. 411, inasmuch as that case dealt with the power of the federal government, through the Rivers and Harbors legislation, to control riparian rights of navigable streams.

The federal cases are instructive, however, on the need for the capacity of present estimation and reasonable computation in determining tax assessments and other encroachments for the improvement of land. Such elements of reasonable computation and the like are completely lacking in the case at bar. No provision was ever made for the estimation of an amount of "special benefits" nor was such ever computed at all. Further, the Missouri procedure makes no provision for, nor was there included in fact, any allegation of any specified amount of special benefits at any time in the process of taking appellants' land.

The Missouri procedure, furthermore, fails to include the safeguard noted in *Bauman* v. *Ross*, 167 U.S. 548, 557, having damages and benefits separately found and stated by the trier of fact.

II. Missouri Cases Relied On Did Not Involve a Constitutional Challenge.

The Missouri cases cited by appellee, *State ex rel. State Highway Commission* v. *Johnson*, (Mo. Sup.) 392 S.W.2d 251, *State ex rel. Highway Commission* v. *Jones*, 321 Mo. 1154, 15 S.W.2d 338, and *State ex rel. State Highway Commission* v. *Bailey*, (Mo. App.) 115 S.W.2d 17, did not involve constitutional challenges in any manner. The only attack contained therein was on the form of certain jury instructions concerned with the distinction between general and special benefits. In *Johnson*, an instruction on fair market value before and after a taking was held valid. Compare that to the case at bar in which a fair market value instruc-

tion was given, the lowest fair market value in evidence was $150 per acre, and yet the jury verdict was not for 2.83 x $150, but for only $150. In *Jones*, it was significant that not one of 16 witnesses called gave any estimate of the value of any special benefits.

It seems apparent that the basic elements of due process are being overrun by Missouri condemnation procedure, even leaving aside the pivotal bills of credit prohibition.

Even in federal proceedings under 33 U.S.C. § 595, the axiom is stated by Judge Miller in *U. S. v. 133.79 Acres of Land*, 230 F. Supp. 973, 977:

> "Without doubt, the just compensation required to be paid for private property taken for public use means the full and perfect equivalent in money of the property taken; that the owner should be put in as good a position pecuniarily as he would have occupied if it had not been taken."

It is respectfully submitted that the Missouri statutory scheme fails to insure this result and consequently suffers from constitutional infirmity on those grounds assigned in addition to the bill of credit prohibition.

The urgency of the need for this Court to prevent the violation of fundamental rights of citizens is echoed in the words of Blackstone, recently quoted by Hershman, "Compensation—Just and Unjust," 21 THE BUSINESS LAWYER 285-286:

> "So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain may it be

urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law. In this and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. . . . All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price. . . ."

Respectfully submitted,

ELWYN L. CADY, JR.
531 Altman Building
103 Petticoat Lane
Kansas City, Missouri 64106
324 Bellevista Drive
Independence, Missouri 64050
Counsel for Appellants.